



## **REDSTONE LEGAL BRIEF**

A Preventive Law Service of The Office of the Staff Judge Advocate  
Redstone Arsenal, AL  
*Keeping You Informed On Personal Legal Affairs*



# **Uniformed Services Former Spouse's Protection Act (USFSPA)**

## **THIS HANDOUT**

is provided for general information purposes; it does not constitute legal advice. If you have specific questions, call 876-9005 to make an appointment with a legal assistance attorney.

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1. **INTRODUCTION:** According to the Uniformed Services Former Spouse's Protection Act (Title 10, United States Code, Section 1408 and Title 32, Code of Federal Regulations, Section 63), under certain conditions, the Defense Finance Center can authorize direct payments to a former spouse of a service member from retired pay in response to a court-ordered alimony, child support, or division of marital property. It is important to note that federal law does not authorize the division of retired pay as property distribution. The federal law says that **IF** the state law authorizes such a division and the former spouse meets certain requirements, the former spouse can then get the direct pay.

2. **ALABAMA:** Alabama law now allows for the division of retired pay as a part of the property settlement. Also, under Federal law, if the parties meet certain requirements and were married for at least ten (10) years, then he/she can get payments directly to him/her.

3. **DIVISION OF RETIRED PAY:** If a state court will award you a portion of your ex-spouse's retired pay, the court order must specifically provide for such payment expressed in dollars or as a percentage of the retired pay. It must also state whether it is being divided for alimony, child support, and/or property division. No magic formula exists to determine the amount individuals are entitled to all the time. If both spouses cannot agree on the proper amount, then state law applies. For those individuals who are from a community property state, the division is 50-50. For those individuals who are from an "equitable distribution state," such as Alabama, they must convince a judge what is an equitable division. Generally, courts use the following method (borrowed from the community property model) when dividing disposable retired pay:

overlap of # of years married, member is in Army  
and both spouses are living together  
(expressed in months)  
$$\frac{\text{time 1/2 - Percentage of military}}{\text{\# of years member is in Army}} \text{ pay spouse is entitled}$$
$$\frac{\text{(expressed in months)}}{\text{monthly}}$$

For example: SGT John Doe has been in the military for 18 years and married to Ms. Susie Doe for 11 years of those 18 years. Aside from TDYs and unaccompanied tours overseas (which don't count as being separated), they have been living together as husband and wife continuously. If they divorce, Ms. Doe may be entitled to 31% of SGT Doe's monthly disposable retired pay:

$$\frac{132 \text{ months (11 yrs x 12 months)}}{216 \text{ months (18 yrs x 12 months)}} \times 1/2 - .31$$

As you can see, it's important for you to argue whether you were living as husband and wife all those years or whether you separated for a time without the possibility of reconciliation. This argument goes to whether your spouse contributed to the marriage during those years. You should also note that a state court is free to award one spouse more than 50% of the retired pay.

However, the amount payable to a spouse or former spouse under this federal law is limited to 50 percent of the disposable retired pay. If a state court awarded you 60% of your former spouse's

retired pay and you qualify under this statute to get direct pay, then you would collect 50% through the Finance Center and your former spouse would be responsible for providing the other 10% to you. You would enforce this order through state law.

4. **WHICH COURT CAN DIVIDE YOUR RETIRED PAY:** For a court to have the power to divide your retired pay the court must have jurisdiction over you. A court can have jurisdiction by reason of (1) your residence, other than because of military assignment, in the territorial jurisdiction of the court; (2) your domicile in the territorial jurisdiction of the court; and (3) your consent to the jurisdiction of the court. 10 U.S.C. Sec 1408 (c) (4) and 32 CFR 63.6 (c) (6).

5. **WHICH FORMER SPOUSE QUALIFY TO GET DIRECT PAYMENT FROM THE MILITARY FINANCE CENTER:** If a state court awards a former spouse part of the Service member's retired pay and that married lasted 10 years or more during which time the service member served 10 years of creditable service toward retirement, then the former spouse can receive his or her portion of the retired pay directly from the military finance center. This 10 year restriction does not apply when enforcing alimony or child support. 10 U.S.C. Sec 1408(d)(2) and 32 C.F.R. Sec 63.6(c)(6).

6. **WHAT AMOUNT OF RETIRED PAY IS SUBJECT TO DIVISION:** Only disposable retired pay is subject to division and a former spouse cannot get more than 50% of the disposable retired pay pursuant to a court order for property distribution. 10 U.S.C. Sec 1408(e)(1) and 32 C.F.R. 63.6(e)(1). Payment of up to an additional 15% of disposable retired pay is authorized in order to honor garnishment orders for child support and/or alimony. The definition of disposable retired pay is different depending on when you divorced.

a. **For those divorced before 3 Feb 91:** Disposable pay is defined as gross pay less authorized deductions. The most frequently applied authorized deductions include amounts owed to the United States; amounts waived in order to receive Veteran's Administration compensation or pension; premiums for SBP established only for the former spouse; state and federal income tax withholdings to the extent that they are consistent with the member's tax liability; and amounts waived in order to receive compensation under Title 5 or Title 38. 10 U.S.C. 1408(a)(4) and 32 C.F.R. 63.6 (e)(2).

b. **For those divorced on or after 3 Feb 91:** Disposable retired pay is defined the same as above except personal debts and income taxes are not subtracted. Thus, an authorized deduction would include amounts owed to the United States for previous overpayment of retired pay and for recoupments required by law resulting from entitlement to retired pay. 10 U.S.C. 1408(a)(4).

c. **Taxes:** For those divorced on or after 3 Feb 91, your share of the retired pay will be calculated before the taxes ultimately liable for taxes on the former spouse's portion. Such liability is determined by facts such as the terms of the court order and the local law of the jurisdiction in which the divorce occurred. However, you should contact the nearest Internal Revenue Service office for further information.

d. **Disability pay:** Court orders that pertain to service members receiving retired pay for disability under Chapter 61, 10 U.S.C. 1201-1221 may not be honored except that a portion of the member's retired pay may be subject to this act for court orders issued on or after 16 Nov 86, depending on the percentage used to compute the member's disability. In other words, no payments will be made from the retired pay of a member retired for disability under Chapter 61

if the divorce was final before November 15, 1986. If the divorce was final after that date, the former spouse may receive up to 50% of the disposable pay, after subtracting the amount of disability awarded at retirement. 10 U.S.C. 1408(a)(4). Disability pay can be used to pay both child support and alimony.

e. Fluctuation in pay: Your share of your former spouse's pay may fluctuate from month to month. This may be due to the fact that your former spouse increases his or her tax withholding or incurs a debt to the government or waives a portion of his or her retired pay to receive disability. Your share may also increase due to an annual cost of living raise or because your former spouse paid off a previous debt.

7. **COMPLIANCE WITH SERVICEMEMBERS CIVIL RELIEF ACT:** Payments will be made only if the court order or other documents certify compliance with the terms of the Servicemembers Civil Relief Act. This applies to only members on active duty at the time the court order was issued. 10 U.S.C. 1408(b)(1)(D) and 32 C.F.R. 63.6(c)(4).

8. **WHEN WILL PAYMENT BEGIN:** Normally, payments will begin to the spouse or former spouse within 90 days after effective service. If the service member is not yet entitled to retired pay, payments normally will begin within 90 days after the service member is entitled to receive retired pay.

9. **WHEN WILL PAYMENTS TERMINATE:** Payments will terminate upon the death of the former spouse or upon the death of the service member, whichever is earlier, or under the provisions of a court order. 10 U.S.C. 1408(d)(4).

10. **WHAT ABOUT ARREARAGES:** Payments made shall be prospective in terms of the amount stated in the court order. Arrearages will not be considered in determining the amount payable from retired pay. 32 C.F.R. 63.6(h)(10). However, arrearages for alimony and child support may be sought under 42. U.S.C. 659 and state garnishment laws.

11. **CAN A COURT ORDER A FORMER SPOUSE TO RETIRE:** A court may not order a service member to apply for retirement in order to initiate payment under this law. 10 U.S.C. 1498(c)(3).

12. **CAN FORMER SPOUSE TRANSFER HIS/HER RIGHT TO RECEIVE THESE PAYMENTS?** An award of retired pay to a spouse or former spouse cannot be sole, assigned, transferred, or otherwise disposed of (including through inheritance) by a spouse or former spouse. 10 U.S.C. 1408(c)(2) and 32 C.F.R. 63.6(h)(11).

13. **WHAT HAPPENS WHEN MORE THAN ONE FORMER SPOUSE MAKES A CLAIM?** When more than one ex-spouse is entitled to make a claim, their respective court orders will be honored on a "first come, first served" basis. 10 U.S.C. 1408 (e)(2).

14. **REOPENING DIVORCES FINALIZED BEFORE 26 JUNE 81:** Divorces finalized before 26 Jun 81 can no longer be reopened for the partition of the military retired pay if it was not mentioned at the time of the divorce. This law addresses the fact that some spouses who had divorced before 26 Jun 81 reopened their cases and received an award. Thus, court orders issued before 26 Jun 81, which direct a division of the retired pay or payments of alimony or child support will be honored under this law. However, orders which don't contain such provisions and

are modified to provide for such a division will not be honored under this law. Court orders issued after 25 Jun 81 may be modified to reflect the state law after 25 Jun 81, and may be honored under this law. 10 U.S.C. 1408 (c)(1) and 32 C.F.R. 63.6(c)(7).

**15. LOCATING A FORMER SPOUSE:** You should include in the divorce decree a clause requiring your spouse to notify you when he or she retires and that he or she gives you permission to contact the Finance Center for information. According to a representative from the Finance Center, if you call them they can tell you whether your former spouse has retired.

**16. PROCEDURE TO EFFECT SERVICE ON ARMY:** The spouse/former spouse or the attorney for that spouse must submit a written application to the director, DFAS, Indianapolis, Indiana, to get a portion of the member's retired pay whether for property distribution, alimony, or child support. The spouse must submit certain information. The requirements of paragraph 16a-e can be satisfied by filing DD Form 2293 (Feb 91), which is attached. You can submit the required paperwork anytime you choose to.

a. The spouse must provide the members name and social security number. The Army serial number is unacceptable.

b. A written statement is required that no modification to this order has been effected, and no appeal will be taken by the applicant.

c. As a condition precedent to payment, the applicant (former spouse) must agree that any future overpayments are recoverable and subject to involuntary collection from the applicant or his or her estate.

d. Also, as a condition precedent to payment, the applicant (former spouse) must agree to notify DFAS if the court order upon which payment is based is vacated, modified or set aside. This includes notice or remarriage, if all or part of the payment is for alimony, or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay.

e. The name and address of the applicant must be furnished.

f. A certified copy of the court order which awards an apportionment of the retired pay to a spouse or former spouse is required (and a copy of the divorce decree, if not the same order). The order must be certified by the issuing court within 90 days of its receipt by DFAS.

g. A court order or other documents must be included which show that the rights of the Soldiers' and Sailors Civil Relief Act were honored. This applies only to those orders issued while the service member was on active duty.

h. Proof of date of marriage is required, if not shown in the court order.

i. Documents must be served by personal service; or by registered or certified mail, return receipt requested, only on the following:

Director, Defense Finance & Accounting Service  
Cleveland Center  
Cleveland, OH 44199-2087  
(216) 522-5301  
(800) 321-1080

17. **PROCEDURE TO AFFECT SERVICE ON OTHER SERVICES:** Although the procedures to effect service on other branches of the armed services are similar to the Army, you may wish to contact the following division to verify the procedures:

Director, Defense Finance & Accounting Service  
Cleveland Center  
Cleveland, OH 44199-2087  
(216) 522-5301  
(800) 321-1080

**NOTE:** You should consult your private attorney to ensure the above laws are still current at the time of the divorce.

**Former Spouse's Military Benefits Under the  
Uniformed Services Former Spouses' Protection Act**

Uniformed Services Former Spouses' Protection Act	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes <sup>3</sup>			
	Number of years			
Benefits for Former Spouses <sup>2</sup>	0 to <10	10 to <15	15 to <20	20 or more
Division of Retired Pay <sup>4</sup>	X	X	X	X
Designation as an SBP Beneficiary <sup>5</sup>	X	X	X	X
Direct Payment <sup>6</sup>				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division <sup>7</sup>		X	X	X
Health Care <sup>8</sup>				
Transitional <sup>9</sup>			X	
Full <sup>10</sup>				X
Insurance <sup>11</sup>	X	X	X	X
Commissary <sup>12</sup>				X
PX <sup>12</sup>				X
Dependent Abuse				
Retired Pay Property Share Equivalent <sup>13</sup>		X	X	X
Transitional Compensation <sup>14</sup>	X	X	X	X

<sup>1</sup> Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

<sup>2</sup>For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (3.g. AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits

<sup>3</sup> Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Force (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999])

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<sup>4</sup> At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985)

<sup>5</sup> Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation an SBP beneficiary

<sup>6</sup> See 10 U.S.C. 1408 (d) & 1408 (e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

<sup>7</sup> While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

<sup>8</sup> To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

<sup>9</sup> Transitional health care "was created by Pub. L. 98-625, 645 (C)(not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. 1078a, titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health purposes, 10 U.S.C. 1072 (2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

<sup>10</sup> "Full health care" includes health care at military treatment facilities and that provided through the CHAMPUS insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60<sup>th</sup> birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an



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unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. 1076 (b)(2).

<sup>11</sup> Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal year 1993 (see 10 U.S.C. 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the basic CHAMPUS program, but CHCBP is not part of CHAMPUS. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

<sup>12</sup> Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse “to the same extent and on the basis as the surviving spouse of a retired member... Pub. L. 97-252, Title X 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses’ Protection Act 006(d). The former spouse must be “unmarried,” and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-E). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

<sup>13</sup> When a retirement-eligible member receive a punitive discharge via court-martial, or is discharged via administrative separation processing, the member’s retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

<sup>14</sup> The National Defense Authorization Act, Fiscal year 1994, 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.